BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DENNIS K. GILLIAM	)	
Claimant	)	
	)	
VS.	)	
	)	
CENTRAL MECHANICAL CONST.	)	
Respondent	)	Docket No. **1,032,907**
	)	
AND	)	
	)	
AMERICAN CAS. CO. OF READING, PA	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the August 8, 2008 Award by Administrative Law Judge Rebecca A. Sanders. The Board heard oral argument on November 13, 2008.

APPEARANCES

Roger D. Fincher of Topeka, Kansas, appeared for the claimant. Jennifer L. Arnett of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument before the Board, the parties stipulated that claimant suffered a 17 percent whole person functional impairment as a result of his work-related accidental injury.

ISSUES

The Administrative Law Judge (ALJ) found claimant should be compensated for a 66.5 percent work disability from July 24, 2007 to September 3, 2007, based upon a 100 percent wage loss and a 33 percent task loss followed by a 41.5 percent work disability

beginning September 4, 2007, based upon a 50 percent wage loss and a 33 percent task loss.

Respondent requests review of the nature and extent of disability. Respondent argues claimant should be limited to his functional impairment because the treating physician released him without permanent restrictions and after he returned to work he later voluntarily left his employment with respondent. Consequently, respondent further argues the claimant failed to make a good faith effort to retain his employment. Respondent also argues that claimant has not met his burden of proof to establish a task loss because in his current job he has demonstrated the ability to perform physical activities that exceed the permanent restrictions used to establish his task loss.

Claimant argues the ALJ's Award should be modified to correct the ALJ's erroneous calculation of the percentage of task loss. The ALJ determined claimant had lost the ability to perform 18 of 27 tasks which results in a 67 percent task loss instead of the 33 percent calculated by the ALJ.[1] Otherwise, the claimant requests that the Board affirm the ALJ's Award.

The sole issue for Board determination is the nature and extent of claimant's disability, specifically whether claimant is entitled to a work disability (a permanent partial general disability greater than the functional impairment rating) and if so, what is his percentage of wage and task loss.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant's job with respondent required him to put duct work together and install it. On December 20, 2006, while at work for respondent at a construction site, claimant climbed a flight of stairs to the second floor. But claimant was unaware that there was no landing at the top of the stairs and when he reached the top of that flight of stairs he stepped forward and fell approximately 13 feet down to the concrete floor. The claimant suffered a right pneumothorax (collapsed lung), a right lung contusion, multiple right rib fractures, a left acetabular fracture (hip socket), and left knee MCL strain.

Claimant was hospitalized until his discharge on December 28, 2006. Claimant underwent physical therapy and at a follow-up appointment with Dr. Holiday on January 23,

[1] It should be noted that the wage loss was also miscalculated and should reflect a 48 percent wage loss using the figures for post-injury wage adopted by the ALJ.

2007, claimant complained of low back pain. Claimant had additional physical therapy for work hardening and was released to full-duty work with no restrictions on April 1, 2007.

When claimant returned to work he would work for a few days and then his back pain would prevent him from working for a day or two. Claimant testified that he told his foremen and project manager at the work site that the work was causing his back pain. And he was told there was no other work. Claimant testified:

> Q. Did you ever ask any of those gentleman [sic] to modify the work that you were required to do to help alleviate the continuing symptoms you were having?
>
> A. Well, I told them that I was having trouble doing it. They knew that.
>
> Q. Okay. But did you ever ask them if you could do different work or if they had different work for you that would be easier for you because of your physical condition?
>
> A. Well, I'd ask them and they'd say this is what there is to do.[2]

Claimant never asked for additional medical treatment but he stated that he did not realize that was an option and no one suggested he could receive further treatment. Claimant testified that before the accident he had never missed a day of work but afterwards he would work a few days and then miss work because of the increased back pain caused by work.

Claimant agreed that he was aware that he was required to call in when he would not be in to work but he noted that when his back "went out" he was not always able to leave his trailer home and get to a phone to call respondent. He did not have a phone at his home. But claimant testified that most of the time he did call in when he was unable to work due to his back pain.

Respondent had issued claimant warnings on April 30, 2007, and July 16, 2007, regarding his failure to call in. Finally, on July 27, 2007, respondent terminated claimant for "no call/no show three days in a row. One day last week.[sic]"[3] However, claimant testified that he had already told a foreman that he had to quit because his back pain prevented him from continuing to work. He testified that he had missed two days work and on the weekend he saw his foreman and told him he just could not do the work anymore. And claimant denied that anyone from respondent ever told him that he had been terminated.

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[2] R.H. Trans. at 36-37.

[3] Wichman Depo., Ex. 1.

Claimant then obtained employment performing light maintenance work at the Hampton Inn in September 2007. His job duties include cleaning the parking lot, taking out the trash and changing light bulbs, and light plumbing. Claimant earns $10 an hour and usually works 30-40 hours a week with no paid benefits. Claimant testified that he has not missed a day of work since he started working for Hampton Inn. Claimant continues to have low back pain.

At claimant's counsel's request, Dr. Lynn A. Curtis examined and evaluated claimant on May 1, 2007. Upon review of claimant's medical history and examination, the doctor diagnosed claimant as having a SP concussion, left hip adductor and flexor muscle tear, cervicothoracic lumbar spine injury with cervical and lumbar radiculopathy, rib fractures with permanent painful deformity of the right ribs, bilateral pelvis strain, pain related hypertension and SP hemothorax and pneumothorax. Dr. Curtis opined that claimant was at maximum medical improvement at the time of his examination. The doctor recommended a TLS brace.

Based upon the AMA *Guides*[4], Dr. Curtis rated claimant's chest wall deformity at 15 percent whole person; 37 percent whole person impairment for his cervical, thoracic and lumbar spine injury; 6 percent whole person impairment for bilateral lower extremities due to the SI joint injury; 6 percent whole person impairment for the right hip injury; and, a 4 percent whole person impairment for the left thigh injury. All of these whole person impairments (15+37+6+6+4) combine for a 54 percent whole person impairment.

Dr. Curtis opined claimant was permanently disabled and would be unable to work full-time without the TLS brace. If claimant uses the brace, his restrictions would be limited to sitting 4 hours per day and standing 4 hours per day. Claimant should have the ability to change from sitting to standing. The doctor also restricted claimant from the following: (1) no bending, kneeling, crawling or climbing ladders; (2) no lifting from the floor; and, (3) no walking on unprotected heights. Finally, Dr. Curtis opined that claimant could only perform 9 out of 27 tasks of Mr. Santner's task analysis list, which is a task loss of 67 percent.

On June 19, 2007, claimant was examined and evaluated by Dr. Michael J. Johnson at respondent's attorney's request. Upon examination, claimant had complaints of left hip, left knee and low back pain. Dr. Johnson review claimant's medical history and diagnosed claimant with right pneumothorax healed with no sequela; right lung contusion healed with no sequela; right rib fractures (1, 3, 4, 5, 6) healed with no sequela; left comminuted acetablular fracture healed; left knee grade I-II MCL strain, healed with questionable medial pain; and low back pain with degenerative disc disease preexisting exacerbation secondary to fall.

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[4] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Dr. Johnson opined that claimant's work-related fall did not cause the degenerative changes in his back and that claimant's pain is 50 percent preexisting. The doctor determined claimant had reached maximum medical improvement on April 23, 2007, the day claimant returned to full-duty work.

Based on the AMA *Guides*, Dr. Johnson rated claimant's impairments as a 0 percent impairment to each for right pneumothorax, lung contusion and rib fractures healed. Due to claimant's loss of hip motion, he received a 15 percent lower extremity impairment or 6 percent whole person impairment; left knee laxity was rated at 7 percent lower extremity impairment or 3 percent whole person. These lower extremity impairments combine for a 22 percent or a 9 percent whole person impairment. The doctor placed claimant in lumbosacral impairment DRE Category II for a 5 percent whole person impairment. Dr. Johnson opined claimant had a 50 percent preexisting and 50 percent exacerbation. Therefore he believed claimant had a 2.5 percent whole person impairment which was due to his work-related fall. The whole person impairments combine for a 11.5 percent whole person functional impairment. Dr. Johnson did not impose any permanent work restrictions.

On August 21, 2007, the ALJ ordered an independent medical examination by Dr. Peter V. Bieri to rate claimant's impairments that resulted from his work-related injury. Dr. Bieri performed a physical examination in accordance with the AMA *Guides* and rated claimant as having 5 percent whole person impairment based on DRE Lumbosacral Category II; 20 percent left lower extremity impairment based on residuals of acetabular fracture with range of motion deficits which converts to an 8 percent whole person impairment; 7 percent left lower extremity (knee) impairment for MCL laxity which converts to a 3 percent whole person impairment; 0 percent impairment for pneumothorax and chest tube placement; 2 percent whole person impairment for rib fractures that involve innervation from the thoracic spine region; and, 1 percent whole person impairment for residuals of pain secondary to multiple rib fractures. The whole person impairments combine for a 17 percent whole person functional impairment.

At the time of his evaluation, Dr. Bieri said claimant was at maximum medical improvement. The doctor placed permanent restrictions on the claimant of limited occasional lifting to 35 pounds; frequent lifting not to exceed 20 pounds; and no more than 10 pounds constantly. The doctor also restricted claimant from climbing and descending ladders.

Mary W. Titterington, a vocational rehabilitation counselor, conducted a personal interview with claimant on May 25, 2008, at the request of respondent's attorney. She prepared a task list of 23 nonduplicative tasks claimant performed in the 15-year period before his injury. At the time of the interview, the claimant was working for Hampton Inn earning $10 an hour. Ms. Titterington thought claimant was capable of driving, sales and because of his work experience light maintenance work. Ms. Titterington opined claimant

was capable of earning from $10 to $12.50 an hour working full time or between $400 and $500 a week.

Richard W. Santner, a vocational rehabilitation counselor, conducted a personal interview with claimant on August 28, 2007, at the request of claimant's attorney. He prepared a task list of 27 nonduplicative tasks claimant performed in the 15-year period before his injury. Mr. Santner noted that claimant was making $10 an hour working for Hampton Inn and that was probably as much as he was capable of earning.

The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.[5] It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony with the testimony of the claimant and others in making a determination on the issue of disability. The trier of fact must make the ultimate decision as to the nature and extent of injury and is not bound by the medical evidence presented.[6]

Because claimant sustained permanent impairment to his lumbosacral spine as well as his ribs, which are nonscheduled injuries, all of his injuries, both scheduled and nonscheduled, are to be combined and compensated as a permanent partial disability under K.S.A. 44-510e.[7]

Respondent argues that claimant is limited to his functional impairment because he did not make a good faith effort to retain his employment with respondent that paid 90 percent or more than his pre-injury average weekly wage. Conversely, claimant argues that he attempted to continue working but his back pain made it physically impossible for him to continue to perform the job.

Because claimant has sustained injuries that are not listed in the "scheduled injury" statute, his permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a). That statute provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall

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[5] *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

[6] *Graff v. Trans World Airlines,* 267 Kan. 854, 983 P.2d 258 (1999).

[7] *Bryant v. Excel*, 239 Kan. 688, 689, 722 P.2d 579 (1986).

> not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*[8] and *Copeland*.[9] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e(a), that a worker's post-injury wage should be based upon the worker's ability to earn wages rather than the actual post-injury wages being earned when the worker fails to make a good faith effort to find appropriate employment after recovering from the work-related injury.

Following that precedent, the Board has also held workers are required to make a good faith effort to obtain and retain their post-injury employment. Consequently, permanent partial general disability benefits are limited to the worker's functional impairment rating when, without justification, a worker voluntarily terminates or fails to make a good faith effort to retain a job that the worker is capable of performing that pays at least 90 percent of the pre-accident wage. On the other hand, employers must also demonstrate good faith. In providing accommodated employment to a worker, *Foulk* is not applicable where the accommodated job is not genuine,[10] where the accommodated job violates the worker's medical restrictions,[11] or where the worker is fired after making a good faith attempt to perform the work but experiences increased symptoms.[12] The good faith of an employee's efforts to find or retain appropriate employment is determined on a case-by-case basis.

In this case, claimant returned to work and attempted to perform his normal job duties. His back pain and increased symptoms prevented claimant from continuing to

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[8] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). But see *Graham v. Dokter Trucking Group*, 284 Kan. 547, 161 P.3d 695 (2007), in which the Kansas Supreme Court held, in construing K.S.A. 44-510e, the language regarding the wage loss prong of the permanent disability formula was plain and unambiguous and, therefore, should be applied according to its express language and that the Court will neither speculate on legislative intent nor add something not there.

[9] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[10] *Tharp v. Eaton Corp.*, 23 Kan. App. 2d 895, 940 P.2d 66 (1997).

[11] *Bohanan v. U.S.D. No. 260*, 24 Kan. App. 2d 362, 947 P.2d 440 (1997).

[12] *Guerrero v. Dold Foods, Inc.*, 22 Kan. App. 2d 53, 913 P.2d 612 (1995).

perform that work. The Board concludes that claimant did make a good faith effort to retain his job but was simply unable to continue in that employment. Moreover, his complaints of continuing pain went unheeded by respondent. And although claimant did not always call in when he was unable to work, that failure was due to his inability to get to a phone due to his back pain and cannot be said to demonstrate bad faith. Consequently, he is entitled to a work disability analysis.

Dr. Curtis reviewed the task list prepared by vocational rehabilitation counselor, Richard Santner. Dr. Curtis opined that based upon his restrictions claimant could still perform 9 out of 27 tasks on Mr. Santner's task analysis list for a 67 percent task loss. Conversely, Dr. Johnson concluded claimant did not require any permanent restrictions and consequently, without permanent restrictions, claimant would not have any task loss. Although Dr. Bieri did not provide an opinion regarding task loss, nonetheless he did give claimant permanent restrictions.

Even in his current job claimant performs activities which clearly exceed the significant restrictions imposed upon his activities by Dr. Curtis. Claimant's current work activities exceed Dr. Curtis' restrictions in that his current job requires more standing, walking, bending, stooping and climbing than Dr. Curtis would allow. Dr. Curtis further opined that claimant would only be able to work if he was allowed to sit for four hours a day. This is another restriction that claimant exceeds in his current employment. Claimant does not wear the back brace that Dr. Curtis opined was essential for claimant to be able to continue to work.

The ALJ noted that claimant has demonstrated the present ability to perform work that exceeds the permanent restrictions placed on him by Dr. Curtis. Although Dr. Johnson did not impose restrictions the ALJ found that claimant does have limitations on his ability to work as corroborated by the permanent restrictions imposed by Dr. Bieri, the court-ordered independent medical examiner.

The fact that claimant continues to perform some physical labor that can exceed his restrictions could mean that such activity continues to aggravate and accelerate claimant's condition and that the economic necessity of working compels claimant to endure the pain caused by exceeding his restrictions, or it can demonstrate that his restrictions were not appropriate.

The task loss opinions reflect a range of task loss from 0 percent to 67 percent. It would not be appropriate to adopt Dr. Curtis's task loss opinion in toto because it was based upon restrictions which do not accurately reflect claimant's demonstrated actual physical abilities. As long as claimant is working for wages in an employment that requires him to routinely exceed his restrictions, it is not appropriate to find a task loss based upon those restrictions. It is illogical to award a work disability based in part on a task loss for tasks claimant is actually performing. Nor would it be appropriate to adopt Dr. Johnson's opinion that there is no task loss as that would disregard not only the claimant's testimony

but also the fact that all the physicians agreed claimant suffered a permanent impairment and the court-ordered independent medical examiner did impose permanent restrictions.

Dr. Bieri placed permanent restrictions on the claimant of limited occasional lifting to 35 pounds; frequent lifting not to exceed 20 pounds; and no more than 10 pounds constantly. Dr. Bieri also restricted claimant from climbing and descending ladders. Dr. Bieri's weight lifting restrictions have the most impact on claimant's ability to work as evidenced by the task lists prepared by Ms. Titterington and Mr. Santner. The claimant's task loss is somewhere in the range provided by the physicians but because of the flaws in both opinions the Board is reluctant to merely average those opinions. Based upon the entire record, the Board concludes that claimant suffers a 26 percent task loss.

Turning to the wage loss component of the work disability formula, the ALJ determined claimant had a wage loss of 100 percent from July 23, 2007 to September 3, 2007. The Board agrees and affirms. The ALJ further determined claimant suffered a 50 percent wage loss beginning September 4, 2007. The ALJ determined claimant's pre-injury average weekly wage was $776.40 and the post-injury wage was $400. Although the ALJ determined that this resulted in a 50 percent wage loss, the Board notes this percentage is based upon an incorrect calculation and should be corrected to reflect a 48 percent wage loss beginning September 4, 2007.

Consequently, the ALJ's Award is modified to reflect that from July 24, 2007 through September 3, 2007, claimant suffered a 63 percent work disability based upon a 100 percent wage loss and a 26 percent task loss. From September 3, 2007, claimant suffered a 37 percent work disability based upon a 48 percent wage loss and a 26 percent task loss.

The work disability formula requires that the percentage of wage loss and task loss be averaged to arrive at the work disability. As previously noted, there were periods of time when claimant's wage loss changed. Generally, whenever there is no gap in disability benefits, the total disability compensation award is the same as if the award were calculated using only the last percentage of permanent impairment. There would be no difference in compensation had this award been calculated using the various changed percentages of wage loss and resultant work disabilities. Because of this, the Board sometimes will only show the abbreviated calculation, but with an explanation that although the percentage of disability changed it makes no difference in the award. That is the case here.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Rebecca A. Sanders dated August 8, 2008, is modified to reflect claimant is entitled to a 37 percent work disability.

Claimant is entitled to 10.71 weeks of temporary total disability compensation at the rate of $483 per week or $5,172.93 followed by 153.55 weeks of permanent partial disability compensation at the rate of $483 per week or $74,164.65 for a 37 percent work disability, making a total award of $79,337.58.

As of March 31, 2009, there would be due and owing to the claimant 10.71 weeks of temporary total disability compensation at the rate of $483 per week in the sum of $5,172.93 plus 108.15 weeks of permanent partial disability compensation at the rate of $483 per week in the sum of $52,236.45 for a total due and owing of $57,409.38, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $21,928.20 shall be paid at the rate of $483 per week for 45.40 weeks or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of April 2009.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

DISSENT

The undersigned respectfully dissents from the Order of the Majority. The restrictions which led to the task loss opinion of Dr. Curtis severely limit claimant's ability to perform work in the open labor market. Here, claimant is working well outside those restrictions. This calls in to question the accuracy of Dr. Curtis' restrictions and resulting task loss opinion. It is claimant's burden to prove his entitlement to the benefits claimed by a preponderance of the credible evidence.[13] The burden of proof means the burden of a party to persuade the trier of fact that the party's position on an issue is more probably true than not true on the basis of the whole record.[14] Here, claimant has failed to satisfy his burden with regard to an accurate set of restrictions and an accurate resulting task loss opinion from Dr. Curtis. As such, the award should be based on claimant's 48 percent wage loss only, with a resulting 24 percent permanent partial general disability.

[13] K.S.A. 44-501 and K.S.A. 44-508(g)

[14] *In Re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

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BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
Jennifer L. Arnett, Attorney for Respondent and its Insurance Carrier
Rebecca A. Sanders, Administrative Law Judge